FILED

MONTANA FIRST JUDICIAL DISTRICT COURT

LEWIS AND CLARK COUNTY

CLARK FORK-PEND OREILLE COALITION; WESTSLOPE CHAPTER, TROUT UNLIMITED; Plaintiffs, vs. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, Defendant, and SEVEN-UP PETE JOINT VENTURE, Defendant-Intervenor.	**Cause No. BVD 96-518** **ORDER ON MOTION FOR JUDGMENT ON THE PLEADINGS, AND MOTION FOR LEAVE TO FILE AMENDED COMPLAINT**

BACKGROUND

On November 22, 1994, Seven-Up Pete Joint Venture (SPJV) submitted a mine permit application to the Department of State Lands (DSL). Pursuant to state agency reorganization, DSL is now the Department of Environmental Quality (DEQ). The mine

project, referred to as the McDonald Gold Project, would be an extensive open pit gold mine in the Blackfoot River valley near the confluence of the Landers Fork and the Blackfoot River. DEQ and other state and federal agencies reviewed the application and, beginning January 19, 1995, submitted over 800 questions to SPJV. SPJV responded to many of these questions; however, over 260 questions were not answered. DEQ eventually either reclassified these unanswered questions to be addressed in the later Montana Environmental Policy Act (MEPA) review, or dropped them altogether. Plaintiffs assert that DEQ simply caved in to SPJV's refusal to answer the questions.

Many of the questions that DEQ reclassified or withdrew addressed the characterization of the hydrologic regime. Pursuant to the Metal Mine Reclamation Act (MMRA), a mine permit applicant is required to provide sufficient ground water and surface water data to characterize the hydrologic regime of the proposed mine site. This data is one of the informational requirements that must be met before DEQ can declare an application "complete." Section 82-4-335(k), MCA.

The parties disagree as to what constitutes a complete application and what level of discretion DEQ is vested with in making the completeness determination. Plaintiffs claim that completeness plays a critical role in further review, setting

both the time allotted for review and the substantive information that will be considered. DEQ and SPJV characterize the completeness requirements as a perfunctory step, analogous to filling in all blanks on a job application. DEQ and SPJV also state that DEQ possesses considerable discretion in making completeness determinations.

On March 22, 1996, DEQ found SPJV's application to be complete. Plaintiffs' complaint challenges DEQ's determination that the permit application for the McDonald Gold Project is complete. Plaintiffs assert that the determination was arbitrary and capricious, and that it violated the Montana Administrative Procedure Act (MAPA). Plaintiffs further claim that DEQ's violation of the law compromises the integrity of further environmental review of the mine and subjects that review to unreasonable time pressure, creating a substantial and significant risk of harm to the environment in the project area. Essentially, Plaintiffs argue that because of the lack of sufficient baseline data in the application, it will be impossible for DEQ to complete the Environmental Impact Statement (EIS) for the mine within the one-year deadline mandated by statute. Plaintiffs also claim that the development and assessment of EIS alternatives will be skewed because baseline conditions are not known.

Plaintiffs seek a writ of mandamus under the MMRA provisions, or alternatively, under the general mandamus allowed by Montana statutes. Plaintiffs ask this Court to declare DEQ's completeness decision void, to require DEQ to refrain from issuing a completeness decision until it receives certain information that Plaintiffs assert is required by the MMRA, and to require DEQ to discuss its reasons for the completeness determination on the record.

Plaintiffs have also submitted a motion for leave to file an amended complaint. With the proposed amendments, Plaintiffs request this Court to order DEQ to promulgate rules formalizing its completeness review procedures under the MMRA.

DEQ has moved for judgment on the pleadings pursuant to Rule 12(c), M.R.Civ.P. DEQ asserts that Plaintiffs have no right of judicial review under the MMRA for the completeness decision, and no similar right under MAPA because this is not a "contested case" as defined there. DEQ also argues that Plaintiffs have no standing to sue, and no cause of action for a writ of mandate either under the general mandamus statutes or the MMRA.

Further, DEQ opposes Plaintiffs' motion to amend the complaint. DEQ states that Plaintiffs' motion must be denied because the amendment would be futile. Specifically, DEQ indicates that such court-ordered rulemaking would violate

constitutional separation of powers, and also that Plaintiffs have failed to exhaust their administrative remedies. SPJV has been granted status as Intervenor in this case, and concurs with DEQ's arguments.

I. MOTION FOR JUDGMENT ON THE PLEADINGS

STANDARD OF REVIEW

Rule 12(c) of the Montana Rules of Civil Procedure states as follows:

> **Motion for judgment on the pleadings.** After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56.

The standards for reviewing a motion for judgment on the pleadings are the same as for a motion to dismiss. ***Kinion v. Design Systems, Inc.***, 197 Mont. 177, 180-81, 641 P.2d 472, 474 (1982). Judgment on the pleadings may be granted if the complaint fails to state a claim for relief. ***Wainman v. Bowler***, 176 Mont. 91, 93-94, 576 P.2d 268, 269-70 (1978). The facts presented in the pleadings and the inferences to be drawn from those facts are to be viewed in the light most favorable to the

nonmoving party. *Wilson v. Doe*, 228 Mont. 42, 43, 740 P.2d 687 (1987). Accordingly, the allegations of a plaintiff's complaint are to be taken as true for purposes of a motion for judgment on the pleadings. *Kinion* at 180, 641 P.2d at 474.

DISCUSSION

A. Standing

The question of standing turns on whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. *Helena Parents Comm. v. Lewis and Clark County*, 53 St. Rep. 687, 688, 922 P.2d 1140, 1142 (1996). In addition, when standing is placed at issue in a case, the court will also determine whether the party whose standing is challenged is a proper party and whether the issue itself is justiciable. *Id.* The following criteria must be met to establish standing:

> (1) The complaining party must clearly allege past, present, or threatened injury to a property or civil right; and (2) the alleged injury must be distinguishable from the injury to the public generally, but the injury need not be exclusive to the complaining party.

Id. (citation omitted). The plaintiff is required to allege a personal stake in the outcome of the controversy. *Id.* (citing *Olson v. Dep't of Revenue*, 223 Mont. 464, 469, 726 P.2d 1162, 1166 (1986)).

The federal courts provide added guidance in determining standing of environmental plaintiffs. The United States Supreme Court has ruled that damage to specific areas regularly used by environmental plaintiffs constitutes injury for purposes of standing. ***United States v. Students Challenging Regulatory Agency Procedures (SCRAP)***, 412 U.S. 669, 678, 93 S. Ct. 2405, 2411, 37 L. Ed. 2d 254, 269 (1973).

In addition, the MMRA specifically recognizes the interests of affected groups. Section 82-4-353, MCA. Any person who may be adversely affected as a result of action taken under MMRA may become party to a related suit. ***Id.***

Plaintiffs allege they regularly use and enjoy the Blackfoot River for recreational purposes. The procedural requirements of the MMRA provide protection of the uses supported by the waters of the Blackfoot River. These elements are sufficient to grant standing. Contrary to Defendants' bold assertions, Plaintiffs need not wait until the mine is operating and the Blackfoot River is polluted to acquire the right to bring a proper suit. The Court, therefore, determines that Plaintiffs possess standing to bring this suit.

B. Judicial Review Pursuant to MMRA and MAPA

Plaintiffs claim they are entitled to a review of the record to determine if DEQ's acts were arbitrary and capricious.

Plaintiffs cite to ***North Fork Preservation v. DSL,*** 238 Mont. 451, 459, 778 P.2d 862, 867 (1989), and also ***MEIC v. DEQ,*** Cause No. BDV-95-1184, Order 8/5/96, at pp. 9-10, as authority that such a review is proper, even in the absence of MAPA applicability. DEQ and SPJV counter that judicial review is only appropriate under specific legislative authority such as MAPA or MMRA, and that neither of those laws allow for judicial review in this case.

The Montana Supreme Court has held that MAPA's judicial review provisions only apply to "contested cases." ***North Fork*** at 457, 778 P.2d at 866; ***Nye v. Dep't of Livestock,*** 196 Mont. 222, 639 P.2d 498 (1981). MAPA defines a contested case as:

> [A] proceeding before an agency in which a determination of legal rights, duties, or privileges of a party is required by law to be made after an opportunity for hearing. The term includes but is not restricted to ratemaking, price fixing, and licensing.

Section 2-4-102(4), MCA. Accordingly, although licensing is included in the definition of contested case, MAPA only applies to those determinations made after the parties have had an opportunity for a hearing. Plaintiffs argue that the Montana Supreme Court is incorrect in its interpretation of this definition. This Court finds that the supreme court's decisions are binding in this case.

Plaintiffs contend that a permit applicant would be entitled to a hearing on the completeness decision pursuant to

the MMRA. However, no provision of the MMRA provides for such a hearing for either the applicant or any other party. Further, it is not clear that an applicant would be entitled to a hearing on the matter to protect property interests based on constitutional due process rights. Thus, the judicial review provisions of MAPA do not apply to DEQ's decision that SPJV's permit application is complete.

North Fork did allow for judicial review in a case where MAPA did not apply. ***North Fork*** at 457, 778 P.2d at 866. The case involved a challenge to DSL's approval of an operating plan for an oil and gas lease near the North Fork of the Flathead River. The plan called for drilling of an exploratory oil and gas well. The challenge focused on the fact that DSL did not require preparation of an EIS prior to approval of the plan, thus the case was governed by the provisions of MEPA and did not otherwise fall within the purview of MAPA. The court found that the "arbitrary and capricious" standard of review, which was used prior to enactment of MAPA, applied in examining the agency's act. *Id.*

However, ***North Fork*** does not outline the circumstances or timing under which review might be appropriate. In that case, the agency involved had made a decision to approve an operating plan. Similarly, in *MEIC v. DEQ*, the agency made a decision to

amend an exploration permit. *MEIC* at 9-10. Finding that an application is complete is not a similarly final action as the approval of an operating plan or amendment of an exploration permit. After the completeness decision, DEQ can still request SPJV to cure deficient data during the ongoing review for adequacy. The subsequent MEPA process requires additional detailed and careful review. Judicial review such as was accorded in *North Fork* and *MEIC* is thus not appropriate in this case.

Plaintiffs also allege that provisions of the MMRA contemplate judicial review of agency decisions. The MMRA does define time limits, attorney fees, and other provisions for hearing and appeal procedures. MMRA permit decisions are not immune from judicial review. Sections 82-4-349 and -350, MCA, both describe judicial review of final decisions granting or denying permits or licenses. The MMRA does not provide for judicial review of a non-final or intermediate agency decision. Accordingly, Plaintiffs are not entitled to judicial review under the provisions of the MMRA.

Plaintiffs' apprehensions that the EIS process will be rushed and based upon incomplete data, and that DEQ may lack the ability to demand data from SPJV, are valid concerns. However, there is no legal tool at this point of the process to address

these concerns in the manner that Plaintiffs request. MEPA provides the methods for groups such as Plaintiffs' to seek cure of a deficient EIS. Accordingly, this Court finds that judicial review of DEQ's completeness decision is not available as a remedy to Plaintiffs.

C. Writ of Mandamus

Plaintiffs request a writ of mandate under the general mandamus provisions of Section 27-26-101, MCA, or alternatively, under the mandamus provisions of the MMRA, Section 82-4-354, MCA. Plaintiffs ask that DEQ require SPJV to submit materials responding to the questions raised in the deficiency letters, and to include in the record a discussion of all issues raised in the deficiency review process.

The party requesting the writ must be entitled to the performance of a clear legal duty by the party against whom the writ is sought. ***Becky v. Butte-Silver Bow School District No. 1***, 274 Mont. 131, 135, 906 P.2d 193, 195 (1995). A writ is not available to compel the performance of a discretionary function. ***Withers v. Beaverhead County***, 218 Mont. 447, 451, 710 P.2d 1339, 1342 (1988). Additionally, a writ will not issue if a plain, speedy, and adequate remedy is available in the ordinary course of law. *Id.*

DEQ maintains that the completeness decision is

discretionary, and MMRA does not impose a clear legal duty on DEQ to vacate and reconsider its completeness decision. This Court agrees. The determination of what amount of data is sufficient to complete an application is a discretionary decision based on detailed technical review. Plaintiffs have thus not established an entitlement to a general writ of mandate.

The MMRA also provides for a writ of mandate to compel public officers to enforce its provisions. Section 82-4-354, MCA, states :

> (1) Any person having an interest that is or may be adversely affected, with knowledge that a requirement of this part or a rule adopted under this part is not being enforced by a public officer or employee whose duty it is to enforce the requirement or rule, may bring the failure to the attention of the public officer or employee by an affidavit stating the specific facts of the failure. . . .
>
> (2) If the public officer or employee neglects or refuses for an unreasonable time after receipt of the affidavit to enforce the requirement or rule, the affiant may bring an action of mandamus in the district court . . . .

Thus, mandamus is available provided that the party seeking it first submits an affidavit to the public officer in question. If the public officer does not remedy the situation, the affiant may proceed to district court.

Plaintiffs in this case never filed an affidavit with

DEQ regarding the issues in this case. Plaintiffs counter that they mentioned their concerns to DEQ in public meetings and in conversations with DEQ personnel, and thus DEQ was on notice of Plaintiffs' concerns. However, the statute is clear that an affidavit is required. As pointed out by DEQ, the legislative history of the statute indicates that the affidavit requirement was crafted not only to put an agency on notice of the concern, but also to encourage resolution of the matter before litigation commences. Failure to file an affidavit prevents an opportunity for such discussion.

Consequently, Plaintiffs are not entitled to a writ of mandamus under the MMRA in light of their failure to file the required affidavit.

II. MOTION TO AMEND THE COMPLAINT

On November 12, 1996, Plaintiffs submitted a motion for leave to file an amended complaint. Plaintiffs request that this Court order DEQ to promulgate sufficient rules to formalize its completeness review procedures under the MMRA. DEQ contends that the separation of powers doctrine prevents this court from making such an order.

Generally, motions to amend are freely granted when justice requires. Rule 15(a), M.R.Civ.P. Reasons such as undue delay, bad faith or dilatory motive on the part of the movant,

undue prejudice to the defendant, or futility of the amendment, can justify a denial of the request to amend. ***Mogan v. City of Harlem***, 238 Mont. 1, 7, 775 P.2d 686, 689 (1989).

DEQ argues that Plaintiffs' motion must be denied because it would be futile for this Court to allow an amended claim which cannot be granted. DEQ states Plaintiffs' amended claims could not be granted because: (1) court-ordered rulemaking violates constitutional separation of powers; and (2) Plaintiffs have failed to exhaust their administrative remedies.

A. Separation of Powers

The power to adopt, amend, and repeal procedural rules is delegated by the legislature to the executive branch agencies. Section 2-4-201, MCA. The Board of Environmental Review holds specific rulemaking authority for the MMRA pursuant to Section 82-4-321, MCA.

Plaintiffs assert that ***Northwest Airlines, Inc. v. State Tax Appeal Board***, 221 Mont. 441, 445, 720 P.2d 676, 678 (1986), provides authority for their amendment. ***Northwest Airlines*** found that a Department of Revenue tax formula change was invalid because it was a rule not promulgated in compliance with the governing statute. *Id.* However, Plaintiffs are requesting this Court not to declare an existing rule invalid,

but rather to order the Department to create rules. Such an action by this Court would violate its role as dictated by separation of powers. ***See*** **Mont. Const.** art. III, § 1.

B. Failure to Exhaust Administrative Remedies

In addition, Montana statutes provide a means for interested persons and groups to seek rulemaking. Section 2-4-315, MCA, describes the process by which a person may petition an agency in writing to request promulgation, amendment, or repeal of a rule. Within 60 days of receiving the petition, the agency must either deny the petition or initiate rulemaking. This administrative process must first be exhausted before the Court can intervene.

Based on the above,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

1. Defendants' motion for judgment on the pleadings is **GRANTED.**

2. Plaintiffs' motion for leave to file an amended complaint is **DENIED.**

3. Accordingly, Plaintiff's complaint is **DISMISSED.**

DATED this 21 day of February, 1997.

DISTRICT COURT JUDGE

pc: Thomas M. France
Timothy C. Fox/Richard R. Thweatt
Alan L. Joscelyn/Joseph P. Beckman

Clarkfor.or

bh/k